



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**MAY 04 2009**

**Marc E. Elias, Esq.**  
**Perkins Coie**  
**607 Fourteenth St. NW**  
**Washington, DC 20005-2011**

**RE: MUR 5833**  
**Friends of Sherrod Brown**  
**Eileen Gallagher, in her official**  
**capacity as treasurer**

**Dear Mr. Elias:**

On October 11, 2006, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On April 15, 2009, the Commission found, on the basis of the information in the complaint, and information provided by the Friends of Sherrod Brown, that there is no reason to believe that the Friends of Sherrod Brown and Eileen Gallagher, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f). Accordingly, the Commission closed its file in this matter as it pertains to your clients. The Factual and Legal Analysis, explaining the Commission's finding, is enclosed.

The Commission reminds you that the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) remain in effect, and that this matter is still open with respect to other respondents. The Commission will notify you when the entire file has been closed.

If you have any questions, please contact Wanda D. Brown, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

**Peter G. Blumberg**  
**Assistant General Counsel**

**Enclosure**  
**Factual and Legal Analysis**

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**BEFORE THE FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Friends of Sherrod Brown  
and Eileen Gallagher, in her  
official capacity as treasurer

**MUR 5833**

**I. BACKGROUND**

This matter was initiated by a signed, sworn, and notarized complaint by the Ohio Republican Party. The complaint alleges, *inter alia*, that the costs of an Ohio Democratic Party ("ODP") mailing featuring Democratic Senatorial candidate Sherrod Brown may have constituted an excessive contribution from the ODP to Friends of Sherrod Brown ("Brown Committee").

Before the 2006 general election, the ODP paid \$157,754 to create and disseminate a four-page mailing featuring two Democratic Party candidates, Ted Strickland (for Governor) and Sherrod Brown (for United States Senate). Complaint, Exhibit A; ODP Response at 1. The mailing encouraged individuals to "vote by mail" for these two candidates and to "turn around Ohio" and "fight . . . corruption in Columbus and Washington." Complaint, Exhibit A at 2-3. It also featured photographs of George W. Bush and former Senator Mike DeWine, and stated that "you don't have to wait until Election Day to send them a message." *Id.* at 1. The mailing stated that Ted Strickland and Sherrod Brown would "put an end to corporate tax breaks that cost taxpayers millions and have left Ohio's families with the third worst tax burden in the nation." *Id.* at 3. It highlighted Sherrod Brown's refusal "to accept the free health care benefits provided members of Congress until all Ohio families have access to adequate care" and argued that Strickland and Brown would "expand job growth by investing in entrepreneurship, innovation, and energy production" and that they would "provide access to world-class schools" to "challenge and prepare our children for the next-generation workforce." *Id.* The

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mailing concluded with: "Ohio Democrats provide the change we need." *Id.* at 4. A disclaimer in a printed box stated that the mailing was "Paid for by the Ohio Democratic Party," and the ODP's street address appeared as a return address above the box. *Id.* at 4. The complainant alleges that, based on the ODP's "fail[ure] to allocate and report" the cost of the mailing, the ODP "may have made an excessive contribution" to the Brown Committee.

In its response to the complaint, the Brown Committee states that it was aware that the ODP had a mail program, but it did not have any information regarding the mailing at issue and "believes it is unlikely that any employees or agents of the Brown Committee reviewed this piece prior to when the Ohio Democratic Party mailed it" because it featured a photograph of Sherrod Brown that the Committee would not have recommended that the ODP use. Further, the Brown Committee argues that it was not responsible for supervising ODP volunteers or ODP mailings to ensure they complied with statutory requirements, and requests that it be dismissed as a respondent.

## II. ANALYSIS

Pursuant to the Federal Election Campaign Act of 1971, as amended ("the Act"), the ODP was permitted to contribute \$5,000 directly to the Brown Committee for the 2006 election cycle. 2 U.S.C. § 441a(a)(2)(a) and (b). In addition, the ODP was permitted to make party expenditures in connection with the general election campaign of candidates for Federal office, pursuant to requirements and limitations of 2 U.S.C. § 441a(d). A contribution or expenditure is a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made for the purpose of influencing an election for Federal office. *See* 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i); 11 C.F.R. §§ 100.52 and 100.111(a) (defining "contribution" and "expenditure"). The term "anything of value" includes in-kind contributions of goods and

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services. 11 C.F.R. § 100.52(d)(1). However, under the volunteer materials exemption, the payment by a state or local party committee of the costs of campaign materials used in connection with volunteer activities on behalf of any nominee of such party are not contributions or expenditures provided that, *inter alia*, the materials are distributed by volunteers and not by commercial or for-profit entities. 11 C.F.R. §§ 100.87 and 100.147. Similarly, under the slate card exemption, costs associated with the preparation, display, or mailing or other distributions of a printed slate card are not contributions or expenditures. 11 C.F.R. §§ 100.80 and 100.140. In order to qualify as a slate card, a communication must list three or more candidates for any public office for which an election is held in the state in which the committee is organized. *Id.*

In this matter, it appears that the ODP pamphlet does not qualify for either exemption. The complainant asserts that the pamphlet bears a commercially-printed address label and postage and was not mailed by volunteers and thus did not qualify as volunteer activity. Further, it is apparent on the face of the pamphlet that it does not feature the requisite three candidates to qualify as a slate card. As a result, it appears that the pamphlet does not qualify as exempt activity.

The cost of creating and disseminating the mailing could potentially result in a coordinated party expenditure or an in-kind contribution if the ODP coordinated the mailing with the Brown Committee. See 11 C.F.R. § 109.37(b) (a payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee as either an in-kind contribution or a coordinated party expenditure). If the Brown Committee coordinated the mailing with the ODP, the expenditure would be a coordinated party expenditure under the Act or an in-kind contribution. If, however, the

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mailing was not coordinated, and the mailing expressly advocates for the election or defeat of Sherrod Brown, a Federal candidate, the expenditure would be an independent expenditure by the ODP on behalf of the Brown Committee. 2 U.S.C. § 431(17).

The complainant in this matter makes no specific allegation of coordination, and presents no facts suggesting that the Brown Committee became materially involved in, made a request or suggestion or had substantial discussions with the ODP regarding the production or dissemination of the communication. 11 C.F.R. § 109.21(a). Further, the Brown Committee denies that it had any information about the mailing. The Commission is also not aware of any publicly available information suggesting that the ODP and the Brown Committee coordinated to produce and disseminate the mailing. Absent information suggesting coordination, it is reasonable to infer that the disbursement related to the mailing was not a coordinated expenditure by the ODP on behalf of the Brown Committee, and therefore the cost of the mailing is not a contribution to the Brown Committee.

Because there is no information suggesting that the ODP coordinated the mailing with the Brown Committee, the Federal Election Commission found no reason to believe that Friends of Sherrod Brown and Eileen Gallagher, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f), and closed the file as to these respondents.

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